Nos. 261 & 262

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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM 1934.

No. .....

S. A. TAYLOR, and JOHN R. DUTY ..... Petitioners

vs.

HENRY STERNBERG, Trustee in Bankruptcy for PARKS DRY GOODS COMPANY, Bankrupt ..... Respondent

PETITION FOR CERTIORARI AND BRIEF IN SUPPORT THEREOF

W. N. IVIE,
Attorney for Petitioners.

INDEX

PETITION:

Page

Caption 1

Judgments below (R. 58-59) 1

Questions presented and statement 1

Specifications of Errors and Jurisdiction 3

Reasons for granting the Petition 3

1. Decision is contrary to decision of Supreme Court in cases of Louisville Trust Co. v. Comingor, Galbraith v. Valleley Trustee, and Randolph v. Scruggs 3

2. Decision is in conflict with the decision of Circuit Court of Appeals, Second Circuit in case of In re Jack Stolkin, Inc., 42 Fed. (2) 829, and case of Crocker v. Kay, 62 Fed. (2) 391 (9th Cir.) 4

3. Decision is in conflict with decision of U. S. Supreme Court, case of In re Watts and Sachs, 190 U.S. 1-35; and decision of Supreme Court, State of Arkansas, in case of Roberts Cotton Oil Co. v. F. E. Morse & Co., 97 Ark. 513 5

4. Questions involved are important 5

5. The decision in case followed by Circuit Court of Appeals, sought to be reviewed herein was mere dictum on questions involved 6

BRIEF:

The facts, Statement and matters involved 7

Jurisdiction 8

FIRST POINT

1. The Circuit Court of Appeals, Eighth Circuit erroneously held that allowances by a State Court to a receiver and his counsel after the initiation of bankruptcy are subject to a turn over order by a bankruptcy court, and such receiver is not an adverse claimant as to allowances for services made after notice of bankruptcy proceedings. This holding is not justified by facts and is contrary to the ruling of this court and other Circuit Courts as well as the weight of authorities ... 8

2. The decision is in conflict with the decision of Circuit Court of Appeals for Second Circuit in case of Re Jack Stolkin, 42 Fed. (2) 829 9

3. Said decision is in conflict with decision of this court in case of Louisville Trust Co. vs. Comingor, 184 U.S. 18 10

4. Said decision is in conflict with decision of this court in case of Galbraith v. Valleley Trustee, 256 U.S. 46 11

5. Said decision is in conflict with a former opinion of the Cir-

cuit Court of Appeals of the Eighth Circuit in the case of Rathman v. Booth, 183 Fed. 913 11

SECOND POINT

1. The Circuit Court of Appeals of Eighth Circuit erroneously held that there is no jurisdiction in the State Courts to make orders of allowances to its receiver or counsel after the filing of bankruptcy petition, but claims for such services must be presented to the bankruptcy court. This holding is in conflict with the authorities hereinbefore cited, and also in conflict with the opinion of this court In re Watts and Sachs, 190 U.S. 1-35 12

2. Said decision is also in conflict with the decision of the Supreme Court of the State of Arkansas in the case of Roberts Cotton Oil Co. v. F. E. Morse & Co., 97 Ark. 513 14

Conclusion 14

Authorities Cited

Croker vs. Kay, 62 Fed. 391 (C.C.A. 9) 4

Guaranty Trust Co., N. Y. vs. Daniel, Trustee, 49 Fed. (2) 866 4

Gross vs. Irving Trust Co., 289 U.S. 343 6-9

Galbraith vs. Valleley, Trustee, 256 U.S. 46 10-11

In re Jack Stolkin, Inc., 42 Fed. (2nd) 829 4-10

Louisville Trust Co. vs. Comingor, 184 U.S. 18 4-10

Murphy vs. John Hoffman & Co., 211 U.S. 562, 569, 570 12

Randolph vs. Scruggs, 190 U.S. 538 4

In re Rathman vs. Booth (C.C.A. 8th Cir.), 913 4-11

Roberts Cotton Oil Co. vs. F. E. Morse and Company, 97 Ark. 513 5-14

S. A. Taylor and Jno. R. Duty vs. Henry Sternberg, Trustee, (C.C.A. 8) Record 55, 56 and 57 3

In re Watts and Sachs, 190 U.S. 1-35 5-13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Petitioners S. A. Taylor and John R. Duty jointly and severally pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals entered in the above entitled causes April 19, 1934 (R. 58-59), affirming the decree of the District Court of the United States for the Western District of Arkansas affirming order of referee on petition of John R. Duty and S. A. Taylor for review. (R. 39).

STATEMENT OF FACTS

This case involves the question whether the referee

in Bankruptcy and the District Court on review has jurisdiction by summary proceeding to order third parties to turn over to trustee in bankruptcy money retained as commissions to receiver and fees to his attorney claimed as having been earned prior to bankruptcy proceedings without the consent of said parties and over their specific objection to the jurisdiction to make such order.

The case was tried below on petition and motion to dismiss and agreed statement of facts, so that for the purpose of this petition the facts are not in dispute. So far as material here, the facts are as follows:

Taylor was appointed receiver of Parks Dry Goods Company, a corporation, by the Chancery Court of Benton County, Arkansas; a month later an involuntary petition in bankruptcy was filed against the company and adjudication followed two days later (February 13, 1931), on the same day, February 13, 1931, Taylor, as receiver, presented his final report to said Chancery Court and asked approval of the report and for certain allowances including the sum allowed to him as receiver and to Duty as attorney, and for authority to turn over the balance to the bankruptcy court. On this report the court made various allowances, including the $1500.00 to Taylor for services as receiver and $500.00 to Duty for services as attorney for the receiver and for the plaintiffs in the receivership suit. The trustee four months later (June 9, 1931), applied to referee for a summary order against Taylor and Duty to turn over the above sums retained by them under the above allowances, to which petitioners herein, Taylor and Duty, filed their joint motion to dismiss the application of the trustee for lack of jurisdiction in the referee to proceed against them summarily on the ground that they were adverse claimants in good faith and in possession of said sums so retained by them. On final hearing by the referee and in the District Court no question was raised as to the jurisdiction of the state

court to the appointment of the petitioners as receiver and attorney respectively, the sole issues being as to whether or not Taylor and Duty, petitioners herein, were adverse claimants within the rule "that summary jurisdiction in bankruptcy does not exist where an adverse claimant is in possession of the property sought to be recovered."

SPECIFICATION OF ERRORS AND JURISDICTION

The opinion of the Circuit Court of Appeals for the Eighth Circuit herein is set forth in record filed herewith pages 55, 56 and 57. Motion for re-hearing filed in United States Circuit Court of Appeals May 17, 1934, and within the time designated by the rules of said court. (R. 60-65). Order denying petition for re-hearing made May 21, 1934. (R. 66). The said Circuit Court of Appeals erred in its opinion in holding "That allowances by a state court to a receiver and to counsel for a receiver, made after initiation of bankruptcy proceedings, are subject to a summary turn over order by bankruptcy court", and in holding "that a receiver is not an adverse claimant as to an allowance for services made to and received by him after notice of bankruptcy proceedings", and in holding "even as to funds or property held by him as such receiver he is not an adverse claimant." And also said Circuit Court of Appeals erred in holding "There is no jurisdiction in a state court to make orders of allowances to its receiver or his counsel after filing of the bankruptcy petition, but claims for such services must be presented to the bankruptcy court."

REASONS FOR GRANTING THE WRIT.

The reasons why the writ should issue are:

I.

The decision of the said Circuit Court of Appeals in

holding that allowances by a state court to a receiver and to counsel for a receiver made after the initiation of bankruptcy proceedings are subject to a turn over order by a bankruptcy court and that a receiver is not an adverse claimant as to allowance for services made to and received after notice of bankruptcy proceedings, are contrary to the decision of this court in Louisville Trust Company v. Cominger, 184 U.S. 18; Galbraith v. Valleley, Trustee, 256 U.S. 46, and Randolph v. Scruggs, 190 U.S. 538, in which cases this court has laid down the principal that assignees, receivers and their attorneys to the extent that they assert rights to expenses incurred and compensation earned in good faith before the bankruptcy proceedings to have the merits of their cases determined in a jurisdictional proceeding suitable to that purpose and not by summary proceedings where punishment for contempt is the means of enforcing the order.

II.

The decision of the Circuit Court of Appeals in the instant case is also in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of In Re Jack Stolkin, Inc., 42 Fed. (2) 829, which holds that for services performed or claims made prior to the filing of petition in bankruptcy can be allowed and paid for in an order of the state court in disposing of the state receivership matter, although such order is made subsequent to the filing of such bankruptcy petition. Said decision is also in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of Crocker v. Kay, 62 Fed. (2) 391, and is also in conflict with its own decision in the case of Rathman v. Booth, 183 Fed. 913, which was cited with approval by this court in the Galbraith case, supra. Said decision of the Circuit Court of Appeals for the Eighth Circuit is also in conflict with its own opinion in the case of Guaranty

Trust Co., N.Y. v. Daniel, Trustee, 49 Fed. (2) 866, in which the court held that "the rule that summary jurisdiction in bankruptcy does not exist against an adverse claimant in possession of property or money sought to be recovered; applies to any suit brought before the referee by the trustee to recover a sum of money alleged to belong to the bankrupt estate."

III.

The decision of the Circuit Court of Appeals in the instant case in holding that "there is no jurisdiction in a State Court to make orders of allowances to its receiver or his counsel after filing of the bankruptcy petition, but claims for such services must be presented to the bankruptcy court" is in conflict with the instructions and decision of this court in the case of In Re Watts and Sachs, 190 U.S. at page 35, in which this court said, "Assuming that bankruptcy proceedings operate to suspend the further administration of the insolvency estate in the state courts, yet it remains for the state court to transfer the assets, settle the accounts of the receiver and close its connections with the matter." This case was followed by the Supreme Court of Arkansas in the case of Roberts Cotton Oil Co. vs. F. E. Morse and Co., 97 Ark. 513, in which it was held that "bankruptcy proceedings terminate the jurisdiction of a state court in the receivership of a corporation, but the state court is required, upon receiving notice of such bankruptcy proceedings, to transfer the assets, settle the accounts of its receiver, and close its connection with the matter."

IV.

The questions involved herein are of importance in administering the bankruptcy law in the several states and the present decision in the instant case leaves the

state courts in confusion as to the proper procedure to be pursued in receivership and assignment cases pending in such state courts after the institution of bankruptcy proceedings, for if the decision in the instant case is permitted to stand State Courts would have no jurisdiction under the law or the rule of comity to make orders transferring the assets or to settle the accounts of its receivers or assignees as directed by the Supreme Court of the United States and the Supreme Court of Arkansas after such courts have received notice that bankruptcy proceedings have been instituted, and, therefore, would tend to disrupt the orderly conduct of state courts and the comity rule existing between state and Federal courts in surrendering jurisdiction over property in hands of receivers, trustees and other officers of the state courts at the time when bankruptcy proceedings were instituted.

V.

The decision of the Circuit Court of Appeals in the instant case in following the decision of the Circuit Court of Appeals of the Sixth Circuit in the case of In Re Crosby Stores Inc., 61 Fed. 812, 814, overlooked the fact that the decision in that case, from which the Circuit Court of Appeals in the instant case quoted, is mere dictum as shown from the statement of this court on review of said case of Crosby Stores under the style of Gross v. Irving Trust Company, 289 U.S. at page 343, which states that the very question involved in the instant case, that is that the Circuit Court of Appeals of the Sixth Circuit had erred in holding that the District Court had power to proceed in a summary proceeding in bankruptcy was not considered by this court "because it appears from the record that this point was abandoned in the District Court," which leaves the very point at issue in the instant case unsolved.

For these reasons it respectfully is submitted that this petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals of the Eighth Circuit should be granted.

W. N. IVIE,
Attorney for Petitioners.

This July ....., 1934.

Brief follows:

No.....

S. A. TAYLOR and
JOHN R. DUTY .....Petitioners

vs.

HENRY STERNBERG, Trustee in Bankruptcy for
PARKS DRY GOODS COMPANY,
Bankrupt ..... Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT

This is an application for a writ of certiorari for a review of a decree of the United States Circuit Court of Appeals of the Eighth Circuit affiming a decree of the United States District Court for the Western District of Arkansas, Fort Smith Division, affirming on review a turn over order by the referee in bankruptcy of said district.

The material facts and the questions involved are set forth in the foregoing petition.

The questions for decision are:

Has the bankruptcy court jurisdiction under summary proceedings to order turn over to the trustee in bankruptcy moneys held and retained by a receiver and his attorney appointed by a State Chancery Court, such money being held and retained by the receiver and attorney as fees and commissions under an allowance made by the State Court in an order winding up the receivership matter in the state court upon receiving notice of the filing of the bankruptcy proceedings, although such allowance is made by the state court subsequent to the filing of the bankruptcy petition where such petition for turn over order is filed four months subsequent to the allowance of such commissions and fee by the state court and where no taking possession of the money or property as the money or property of the bankrupt by any act of any officer of the bankruptcy court such as a referee, a receiver or a trustee?

The essential facts of the case are fully stated in the accompanying petition for certiorari, and in the interest of brevity are not repeated here. All necessary elaboration of the facts on the points involved will be made in the course of the argument which follows.

JURISDICTION

The jurisdiction of this court is based upon Judicial Code Section 240, as amended by the Act of February 13, 1925, U.S.C.A. Title 28, Volume 4, page 359, Section 347.

The original date of the judgment sought to be reviewed and reversed is dated April 19, 1934 (R. 57). Petition for rehearing was filed May 17, 1934, within the time provided by the rules of the Circuit Court of Appeals (R. 65), and the petition for rehearing was denied May 21, 1934 (R. 66).

FIRST POINT

1. The Circuit Court of Appeals for the Eighth Cir-

cuit in its opinion and judgment asked to be reviewed herein erroneously and arbitrarily held that "Allowance by a state court to a receiver and to counsel for a receiver made after the initiation of bankruptcy proceedings are subject to a turn over order by a bankruptcy court, and such receiver is not an adverse claimant as to allowance for services made to and received after notice of bankruptcy proceedings." This holding we maintain is not justified by the facts and is contrary to the rulings of this court and of other circuits, and is contrary to the former opinion of the said Eighth Circuit, as well as to the weight of authorities. The said Circuit Court of Appeals in its opinion relies and bases its opinion upon the opinion from the Sixth Circuit Court of Appeals in the case of In Re Crosby Stores Inc., 61 Fed. 812, 814. We submit that the facts in that case and the facts in the instant case are very distinguishable in that in the Crosby Stores case the allowances complained of were not only made and paid subseqquent to the initiation of bankruptcy proceedings, but the claim for commission and fees as receiver and attorney arose and was made subsequent to the institution of such bankruptcy proceedings, and the decision in the Crosby Stores case was reviewed by this court on certiorari and is reported under the head of Gross v. Irving Trust Company, 289 U.S. page 343, in which this court, as we think, expresses some doubt or uncertainty as to the very questions at issue in the instant case, in the following language:

> "The decision of the Circuit Court of Appeals is assailed as erroneous upon the further ground that that court held that the District Court had power to proceed in a summary proceeding in bankruptcy, although the receivers and their counsel were adverse claimants. We do not consider this contention, because it appears from the record that the point was abandoned in the District Court."

2. The decision of the Circuit Court of Appeals in

the instant case is directly in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of In Re Jack Stolkin, Inc., 42 Fed. (2) 829. In that case the Circuit Court of Appeals for the Second Circuit, after citing the decision of this court in the case of Louisville Trust Company v. Comingor, 184 U.S. 18 and Galbraith v. Valleley Trustee, 256 U.S. 46, and other authorities, holds that:

> "Thus it seems to have been steadily held that the claims of an assignee for the compensation or indemnity for expenses in matters ante dating the filing of a petition in bankruptcy so far as they are not colorable cannot be disposed of in a summary proceeding. The amount which may be allowed depends upon the benefit which has been afforded to the bankruptcy estate. But it must be determined in a plenary action if the assignee stands on his rights in this respect."

3. The case of Louisville Trust Company v. Comingor, 184 U.S. 18, involved the same question as presented in the instant case. In that case Comingor, who was the assignee or trustee subsequent to the filing of bankruptcy proceedings, retained and paid himself as such trustee and his attorney commissions and fees, and thereafter the referee in bankruptcy entered an order requiring Comingor and his counsel to appear and show cause why they should not pay over to the receiver in bankruptcy the amount of said commission and fee. Comingor appeared and objected to the jurisdiction of the court to hear the matter in a summary proceeding. The referee held the response insufficient and made the order requiring Comingor to pay to the receiver in bankruptcy the sum of money paid to his attorney amounting to $3200.00. On a petition for review before the District Judge the finding of the referee was affirmed. An appeal was taken to the Court of Appeals for the Sixth Circuit. That Court reversed the decree of the District

Court affirming the order of the referee requiring Comingor to pay to the trustee the sum as aforesaid, and directing the setting aside of said order and decree. This court on reviewing the judgment of the Circuit Court of Appeals of the Sixth Circuit held,

> "The questions attempted to be litigated before the Referee and in the District Court as to the allowance of the two amounts could only be raised in the suit. If the jurisdiction of the District Court was not District Court by consent, and then only by plenary consented to, then the state court, under the circumstances of this case, was the proper forum, and the matters in dispute were to be disposed of there."

4. In the case of Galbraith v. Valleley, Trustee, 256 U.S. 46, this court followed the rule laid down in the Comingor case, supra, and reversed the Circuit Court of Appeals of the Eighth Circuit, and at page 50 of 256 U.S., supra, this court said,

> "The principle of the Comingor case has never been departed from in this Court. It establishes the right of an assignee for the benefit of creditors to the extent that he asserts rights to expenses incurred and compensation earned under an assignment in good faith before the bankruptcy proceedings, to have the merits of his claim determined in a judicial proceedings suitable to that purpose and not by summary proceedings where punishment for contempt is the means of enforcing the order. We see no occasion to depart from this practice."

5. The decision of the Circuit Court of Appeals in the instant case we think is also in direct conflict with the former opinion of that court in the case of Rathman v. Booth, 183 Fed. 913. The opinion in that case was by Circuit Judge Sanborn and is referred to and quoted by this court in the Galbraith case, supra, with approval. On page 926 in the opinion of the court Judge Sanborn

quotes from this court in the case of Murphy v. John Hofman and Co., 211 U.S. 562, 569, 570, as follows:

> "The jurisdiction in such cases arise out of the possession of the property and is exclusive of all other courts, although otherwise the controversy would be consizable by them. (Citing Whitney v. Wenman, 198 U.S. 539, and White v. Schloerb, 178 U.S. 542). The last two cases cited proceed upon and establish the principle that when the court of bankruptcy, through the act of its officers, such as referees, receivers, or trustees, has taken possession of the res, as the property of the bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and that its possession cannot be disturbed by the process of any other court."

And Judge Sanborn, after quoting from this court as above, continues:

> "Here is the touchstone of the exclusive and of the summary jurisdiction of the bankruptcy court to determine the merits of adverse claims to liens upon and title to property claimed to belong to the bankrupt. It is the taking possession of the property, as the property of the bankrupt, by the act of some officer of the bankruptcy court such as a referee, a receiver, or a trustee. This is the touchstone of a summary jurisdiction and under this rule the court below had no jurisdiction to determine in a summary proceeding the merits of the claim of Booth, as that court had never through the act of its officers, such as referee, receivers or trustees, taken possession of the property of the bankrupt, nor is this result either unjust or unreasonable. The goods were in the custody of the law, and the acts of the state court and its receiver were presumably for the benefit of the estate."

SECOND POINT

1. The Circuit Court of Appeals of the Eighth Cir-

cuit in the instant case holds that "There is no jurisdiction in the state courts to make orders of allowances to its receiver or his counsel after the filing of bankruptcy petition, but claims for such services must be presented to the bankruptcy court." We submit that this holding of the Circuit Court of Appeals is in direct conflict with the opinion of the Circuit Court of Appeals for the Second Circuit in the case of In Re Jack Stolkin, supra, and also is in conflict with the opinions of this court in Comingor and Galbraith cases, supra, which are cited and quoted from in the argument of the first point herein, and is also in conflict with the direct instruction of this court in the case of In Re Watts and Sachs, 190 U.S., 1, 35; on page 35 this court in that case holds:

> "The state court was a court of original general jurisdiction. On the face of its record its jurisdiction has been properly invoked and has been properly exercised and was not open to collateral attack. Assuming that the proceedings in bankruptcy superseded further proceedings in the state court and nothing remained for the latter but to direct the surrender of the assets and the winding up of the accounts, the District Court was of the opinion that it might, by summary proceeding, take the assets out of the possession of the state court. The difficulty is that the receiver had no power to make the surrender when it was made. It was the representative of the state court. The property in its hands was property *in custodia legis* and it had only such authority as was given to it by the Court and could not exceed the limits prescribed by the Court."

And the court further holds that,

> "It has been already assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvent's estate in the State Court, but it remained to the State Court to transfer the assets, settle the accounts of its receiver and close

its connection with the matter. Errors, if any, committed in so doing could be rectified in due course and in the designated way."

2. The same rule was followed by the Supreme Court of Arkansas in the case of Roberts Cotton Oil Company v. F. E. Morse and Co., 97 Ark. 513. In that case the Supreme Court of Arkansas holds that the Chancery Court had full jurisdiction to appoint a receiver for the purpose of collecting and preserving the estate and protecting the creditors, and while its orders therein might be voidable by a trustee in bankruptcy subsequently appointed, they would not be void upon a collateral attack by a stranger; and further says:

> "Involuntary bankruptcy presented against an insolvent corporation within four months of the appointment of a receiver of the corporation by a state court terminates its jurisdiction, and the state court is required to transfer the assets, settle the accounts of its receiver and close its connection with the matter."

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of supervisory powers, in order that the errors herein pointed out may be corrected; that the law may be properly and authoritatively defined and that the judgment of the District Court and of the United States Circuit Court of Appeals for the Eighth Circuit should be reversed in order that justice may be done to petitioners; and that to such an end a writ of certiorari should be granted and this court should review the decision of the United States Circuit Court of Appeals for the Eighth Circuit and finally reverse it.

W. N. IVIE,
Attorney for Petitioners.